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No. 99-1878

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1999

JOHN G. STRAND, JOHN C. SHEA, and DAVID A. SVANDA, Commissioners of the Michigan Public Service Commission, *Petitioners*,

v.

MICHIGAN BELL TELEPHONE CO., UNITED STATES OF AMERICA, FEDERAL COMMUNICATIONS COMMISSION, and CLIMAX TELEPHONE CO., *Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

SUPPLEMENTAL BRIEF FOR MICHIGAN BELL TELEPHONE COMPANY d/b/a AMERITECH MICHIGAN IN OPPOSITION

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SUPPLEMENTAL BRIEF FOR MICHIGAN BELL TELEPHONE COMPANY d/b/a AMERITECH MICHIGAN IN OPPOSITION

Pursuant to Rule 15.8, respondent Michigan Bell Telephone Company d/b/a Ameritech Michigan ("Ameritech") respectfully draws to this Court's attention the Seventh Circuit's decision in *MCI Telecommunications Corp. v. Illinois Bell Tel. Co.*, 2000 WL 1010863 (7th Cir. July 24, 2000) ("*MCI*"), issued on July 24, 2000, that bears on the question presented in this case.

1. In *MCI*, the Seventh Circuit held that the carriers may proceed with their respective federal claims for equitable relief against the individual commissioners under the *Ex parte Young* doctrine." 2000 WL 1010863, at *2.[1/] In so doing, the court expressly "agree[d] with the Sixth and Tenth Circuits" that suits seeking injunctive relief from determinations made by state commissions that allegedly are contrary to the 1996 Act "are 'straightforward' *Ex parte Young* cases." *Id.* at *18. This decision preserves the unanimity in the courts of appeals on the sole question presented in the Commissioners' petition. See Ameritech Brief in Opposition ("Ameritech Br.") 8-10. For that reason alone, *MCI* provides significant additional support for Ameritech's (and the United States') contention that the petition should be denied.

2. The *MCI* decision has significance far beyond its holding, however, because the Seventh Circuit's comprehensive and well-reasoned decision expressly identified and rejected

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[1] The court also independently held that "the states have waived their Eleventh Amendment immunity by participating in the regulatory scheme created by the Act." *Id.*

many of the flawed arguments advanced by the petitioners in this case.

a. Most importantly, the Seventh Circuit squarely rejected the Illinois and Wisconsin Commissioners' argument that this Court's decision in *Seminole Tribe* v. *Florida*, 517 U.S. 44 (1996), somehow rendered the *Ex parte Young* doctrine inapplicable to cases brought under section 252(e)(6) of the 1996 Act. *MCI*, 2000 WL 1010863, at *19. In particular, the Seventh Circuit found the Commissioners' analogy to *Seminole Tribe* to be "flawed," because "[s]ection 252 of the Act does not create a 'detailed remedial scheme' that manifests Congress' intent to limit the scope of statutory remedies available to parties aggrieved by state commissioners' interconnection determinations." *Id.* As the court noted, "in stark contrast to what the Supreme Court called a 'modest set of sanctions' under the statute at issue in *Seminole Tribe*," Congress "has not limited the court's remedial power under subsection 252(e)(6) of the 1996 Telecommunications Act." *Id.* at *19-*20. This is precisely the reasoning advanced by Ameritech in its Brief in Opposition. See Ameritech Br. 10-14.[2/]

b. The Seventh Circuit also rejected the argument, advanced by the Michigan Commissioners here and by the

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[2] The Seventh Circuit also correctly noted that this Court's decisions in *Alden* v. *Maine*, 527 U.S. 706 (1999), *College Savings Bank*, v. *Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999), and *Florida Prepaid Postsecondary Educ. Expense Bd.* v. *College Savings Bank*, 527 U.S. 627 (1999), not only "have not called the *Ex parte Young* doctrine into question," but, in fact, have "reaffirmed the doctrine's role in the sovereign immunity context." 2000 WL 1010863, at *18.

Illinois and Wisconsin Commissioners in *MCI*, that the Act provides only for federal court review of interconnection agreements themselves, but not of state commission determinations arbitrating, approving, interpreting or enforcing those agreements. As the court held, subsections 252(e)(4) and (e)(6) of the Act, read together, show that "Congress envisioned suits reviewing 'actions' by state commissions, as opposed to reviewing only the agreements themselves, and that Congress intended that such suits be brought exclusively in federal court." *MCI*, 2000 WL 1010863, at *12; see also Ameritech Br. 15-17.

c. Finally, the Seventh Circuit explicitly rejected the argument that *Ex parte Young* does not apply because any violations of federal law that may have occurred during a state commission's deliberations over an interconnection agreement "occurred in the past." *MCI*, 2000 WL 1010863, at *18. As the court noted in words that are equally applicable here, "[t]he challenged determinations are still in place, and the carriers seek to have the commissioners conform their future actions, including their continuing enforcement of the challenged determinations, with federal law." *Id.* A request for such relief, the court concluded, "is precisely the type contemplated by the *Ex parte Young* doctrine," and the carriers' claim thus "fit squarely within the traditional framework of *Ex parte Young*." *Id.* See also Ameritech Br. 21-23.

* * * * *

In the most comprehensive court of appeals opinion issued to date, the Seventh Circuit joined the Sixth Circuit and the Tenth Circuit in rejecting the arguments set forth in the Commissioners' petition. No circuits have reached a contrary result. Moreover, as Ameritech and the United States have demonstrated in their briefs in opposition, the unanimous views of the courts of appeals are entirely consistent with this Court's

decision in *Seminole Tribe* and with the entire body of this Court's *Ex parte Young* jurisprudence. For all of these reasons, there is no reason to grant review in this case.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted.

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